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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

MORAGA-ORINDA FIRE DISTRICT, Plaintiff and Appellant, v. BRIAN FAVRO, Defendant and Respondent, STEPHEN ROGNESS, Intervener and Appellant.	A150651 (Contra Costa County Super. Ct. Nos. MSC14-00341, MSC14-01391)
MICHAEL RATTARY et al. Plaintiffs and Appellants, v. BRIAN FAVRO, Defendant and Respondent.	A150712 (Contra Costa County Super. Ct. Nos. MSC14-00341, MSC14-01391)

On a wet, rainy morning in the winter of 2012, Moraga-Orinda Fire District firefighters Michael Rattary, Kelly Morris, and Stephen Rogness (collectively, firefighters) were on the shoulder of eastbound Highway 24, tending to individuals who had recently been involved in a four-car pileup just east of the Caldecott Tunnel. Their fire engine was parked behind the four cars on the shoulder, with the fire engine purposefully blocking the lane closest to the shoulder. Respondent Favro then came speeding through the tunnel. Favro lost control of his vehicle, hit the fire engine, and ultimately spun to a stop in the path of oncoming traffic. To help Favro, the three firefighters left the shoulder of the road where they had been tending to the original

accident. As they walked Favro from the middle of Highway 24 toward the shoulder, the three firefighters (and Favro) were struck and injured by yet another vehicle that had spun out of control–this time, an SUV driven by Salvador Briseno-Castaneda.

Plaintiff Moraga-Orinda Fire District (Moraga-Orinda) sued Favro and Briseno-Castaneda in a subrogation action seeking to recover workers' compensation benefits paid to the injured firefighters. Plaintiff Rogness intervened as a plaintiff in Moraga-Orinda's action, while plaintiffs Rattary and Morris sued Favro and Briseno-Castaneda separately for personal injury. The trial court consolidated these actions with an earlier lawsuit filed by Favro against one of the drivers involved in the initial four-car pileup.

Favro moved for summary judgment against Moraga-Orinda and the firefighters (collectively, plaintiffs). He argued that their lawsuits were barred by the firefighter's rule, a common law doctrine precluding emergency responders from suing a defendant for negligence when the negligent conduct in question caused the emergency that summoned the responders. On that basis, the trial court granted summary judgment in favor of Favro.

On appeal, Moraga-Orinda argues that by granting summary judgment for Favro, the trial court erred in two respects. First, Moraga-Orinda contends that the facts of the case fall within the common law "independent cause" exception to the firefighter's rule. In the alternative, Moraga-Orinda maintains that there are triable issues of fact which, if resolved in Moraga-Orinda's favor, would place the matter within the statutory exceptions to the firefighter's rule set forth in Civil Code[1] section 1714.9, subdivisions (a)(1) and (a)(2). In their consolidated appeal, the firefighters join the arguments raised by Moraga-Orinda and raise none in addition. We agree with plaintiffs' argument concerning section 1714.9, subdivision (a)(1) and reverse on that basis alone.

[1] All subsequent statutory references are to the Civil Code unless otherwise specified.

BACKGROUND

On December 2, 2012, in heavy rain, James Kang lost control of his car east of the Caldecott Tunnel on eastbound Highway 24, colliding with the median and ending up on the right shoulder, partially blocking the rightmost lane, lane No. 4.[2] Kang called 911.

Approximately ten to twenty minutes after Kang's accident, Emily Steelhammer lost control of her own car, striking two other vehicles and colliding with Kang's. Steelhammer and the drivers of the two other cars moved their respective cars to the right shoulder, joining Kang.

Traveling engine No. 43, Moraga-Orinda firefighters Rattery and Rogness responded to the scene of the four-car pileup, where they were joined by Morris, a Moraga-Orinda firefighter and paramedic who arrived in an ambulance. The firefighters positioned the fire engine in the No. 4 lane in order to create a safety barrier between oncoming traffic and the four cars involved in the accident. They turned on the flashing lights, both on the overhead light bar and on the rear of the truck.

As the firefighters rendered aid on the right shoulder of the road, Favro lost control of his car, striking the rear of the fire engine and coming to rest between lanes No. 2 and 3. From the shoulder, Kang observed Favro turning his head in the direction of the fire truck and looking directly at it before losing control of his car. No firefighter was injured by Favro's collision with the fire engine.

Firefighters Rattery, Rogness, and Morris walked into the No. 3 lane to tend to Favro. Favro told them that he was "really shook up" and that he thought he "was going a little too fast." Seeing Favro get out of his car, the firefighters told him to follow them back to the right shoulder. Rather than following the firefighters immediately, Favro first walked around to the rear of his car and then back to the driver's side; he ultimately followed the firefighters' recommendation. According to Rattery, "probably a couple

[2] In their briefs, the parties designate the lane furthest to the left (sometimes known as the "fast lane") as lane No. 1, with each succeeding lane to the right referred to as lane No. 2, lane No. 3, and finally lane No. 4. We adopt this approach.

minutes" passed between the firefighters' request that Favro accompany them and Favro's eventual cooperation in that regard.

As Rattery, Rogness, and Morris were escorting Favro to the right shoulder, Briseno-Castaneda lost control of his SUV after he drove through a large puddle; the vehicle flipped over, striking and injuring Favro and all three firefighters. Bristeno-Castaneda's vehicle did not hit Favro's car or any other vehicle before striking the group of four.

Seeking to recover the workers' compensation benefits it paid to Rattary, Rogness, and Morris, Moraga-Orinda filed a subrogation action against, inter alia, Favro and Briseno-Castaneda. Rogness subsequently intervened as a plaintiff in the same action. Separately, Rattary and Morris filed a personal injury action against Favro and Briseno-Castaneda. By late 2014, the subrogation action and the personal injury action had been consolidated under the same master case.

Favro moved for summary judgment on the basis that the firefighter's rule precluded Rattary's and Morris' action, and, in turn, precluded the subrogation action as well. The trial court granted summary judgment in favor of Favro, reasoning that "Favro's allegedly negligent conduct and collision created a new . . . scene," and thus, lay under the protection of the firefighter's rule. The court further ruled that the statutory exceptions to the firefighter's rule codified in section 1714.9, subdivisions (a)(1) and (a)(2), respectively, were inapplicable. The court entered judgment against Moraga-Orinda and the firefighters in December 2016.

DISCUSSION

A "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 473c, subd. (c).) "[T]here is no presumption of the correctness of an order granting summary judgment, nor do we presume that the evidence supports the judgment." (*Mata v. City of Los Angeles* (1993) 20 Cal.App.4th 141, 147.) Rather, we examine the record de novo "to see whether the

moving party is entitled to summary judgment as a matter of law or whether there are any genuine issues of material fact." (*Ibid.*)

I. Governing Legal Principles

As originally adopted, "[t]he '[firefighter]'s rule' . . . negates liability to [firefighters] by one whose negligence causes or contributes to the fire which in turn causes the death or injury of the [firefighter]." (*Giorgi v. Pacific Gas & Electric Co.* (1968) 266 Cal.App.2d 355, 357.) "The [firefighter]'s rule is primarily based on the principle of law denominated assumption of risk." (*Lipson v. Superior Court* (1982) 31 Cal.3d 362, 370 (*Lipson*).) "In terms of duty, it may be said there is none owed the [firefighter] to exercise care so as not to require the special services for which he is trained and paid." (*Calatayud v. State of California* (1998) 18 Cal.4th 1057, 1061, quoting *Walters v. Sloan* (1977) 20 Cal.3d 199, 205.)

There are, however, judicial and statutory exceptions to the firefighter's rule. The "independent cause" exception applies "when the [firefighter's] injuries are proximately caused by tortious conduct independent from that which was responsible for the summoning of the [firefighter]. In that case, the [firefighter's] rule does not bar recovery." (*Lipson*, *supra*, 31 Cal.3d at p. 376.) Separately, section 1714.9, subdivision (a)(1) provides that the firefighter's rule does not apply when the defendant's negligent "conduct causing the injury occurs after the person knows or should have known of the presence of the . . . firefighter." Subdivision (a)(2) of the same section further excepts from the firefighter's rule those cases "where the conduct causing injury violates a statute, ordinance, or regulation, and the conduct causing injury was itself not the event that precipitated either the response or presence of the . . . firefighter."

II. The "Independent Cause" Exception Is Inapplicable.

Plaintiffs contend that the "independent cause" exception to the firefighter's rule applies because Favro's negligent acts—driving too fast for the existing weather and road conditions—"were not what caused the firefighters to be present on Highway 24 that morning." In so arguing, they disagree with the trial court's characterization of "Favro's

accident as a 'new scene' to which the firefighters responded, with Favro being 'another patient.' "

In *Donohue v. San Francisco Housing Authority* (1993) 16 Cal.App.4th 658, the court explained that to invoke the firefighter's rule, a defendant's "negligence must create an obvious risk and be the cause of the [firefighter's] presence." (*Id.* at p. 663.) The court further explained the "independent cause" exception as the principle that the firefighter's rule "does not bar recovery for independent acts of misconduct which were not the cause of the plaintiff's presence on the scene." (*Ibid.*, italics omitted.) The *Donohue* court considered the case of a firefighter who "slipped and fell on wet, slick stairs during an unannounced fire safety inspection of a [certain] building." (*Id.* at p. 660.) Because the building owner's negligent conduct in failing to properly maintain the stairs was not "the reason for [the firefighter's] presence," the independent cause exception applied, and the firefighter's rule did not bar the claim. (*Id*. at p. 663.)

Here, by contrast, the Moraga-Orinda firefighters were injured while walking Favro across the highway to the right shoulder. Favro's automobile accident was the only reason the firefighters had ventured onto the road at all. Favro's alleged negligence resulted in him being in the middle of the highway in heavy rain, thereby creating an obvious risk that the firefighters confronted when they attended to Favro and attempted to guide him to safety. In this case, then, Favro's negligence was the very reason for the firefighters' presence on the highway, and not an independent cause of the firefighters' injuries.

This analysis is consistent with *Seibert Security Services, Inc. v. Superior Court* (1993) 18 Cal.App.4th 394 (*Seibert*), on which the trial court relied in determining that Favro's accident constituted a "new scene," distinct from the four-car pileup to which the firefighters were attending when Favro crashed. In *Seibert*, a police officer brought an arrestee to a hospital for examination of possible injuries. (*Id.* at p. 402.) While the officer was still at the hospital, a Seibert employee negligently removed handcuffs worn by a mental patient who had previously engaged in abusive and aggressive behavior. (*Id.* at p. 402.) When the uncuffed patient attacked the Seibert employee, the employee cried

for help. (*Id.* at p. 403.) The police officer, who was nearby filling out paperwork relating to the injured arrestee, responded to the Siebert employee's cry for help and attempted to subdue the mental patient, who injured the officer in the ensuing struggle. (*Id*. at p. 411.) The *Siebert* court held that "[w]hile the conduct of Seibert employees may have been 'independent of and unrelated to' the conduct which originally brought plaintiff to the hospital, it is factually undisputed that it was the *immediate cause* of [the officer's] presence in or near the holding cell in which [the patient] was tussling with [the] Seibert employee." (*Ibid*.) Accordingly, although the officer "was still 'present,' at least in the vicinity, and was known by the Seibert employees to be a police officer . . . he was not performing any police duty with respect to" the patient whom he confronted and who ultimately injured him. (*Id.* at p. 410.) In those circumstances, the court reasoned: "For the purposes of the [firefighter]'s rule, [the officer] might as well have been 20 blocks away rather than 20 feet." (*Ibid.*) As the circumstances in *Seibert* are analogous to those here, the trial court correctly determined that the "independent cause" exception was inapplicable.

Plaintiffs argue that the present case is distinguishable from *Siebert* in two respects. First, Favro's alleged negligent conduct was "unrelated to the original dispatch of the firefighters," and second, "invoking [*Seibert*'s] own language[,] Favro's conduct increased the risk inherent in assisting the original accident victims." But because Favro's accident was a *new* scene to which the firefighters responded (just as was the patient's outburst that necessitated the response of the already-present officer in *Seibert*), it is irrelevant that Favro's alleged negligent conduct was unrelated to the *original* dispatch of the firefighters.

Moreover, the "increased risk" language from *Siebert* appears in the following context: "Unless the police officer or firefighter has come to a specific location to perform a specific immediate duty, and the defendant's unrelated negligent or intentional conduct increases the risks inherent in performing that duty [citation], this [independent cause] exception is similarly inapplicable." (*Seibert, supra,* 18 Cal.App.4th at p. 411.) In other words, the question is whether the conduct increased the risk of performing the

same specific, immediate duty that brought the firefighter to a certain, specific location. Here, the specific duty that brought the firefighters to the middle of the highway was not the duty to tend to the four-car pileup on the right shoulder, but rather, the duty to render aid to Favro. Thus, as Favro's accident was a "new scene" for the purposes of the firefighter's rule, it makes no difference whether his conduct increased the risk associated with tending to the previous scene.[3]

Not only does the *Seibert* court's analysis apply to the facts of the present case, it also undermines plaintiffs' attempt to distinguish *Kelhi v. Fitzpatrick* (1994) 25 Cal.App.4th 1149. Kehli was an on-duty highway patrol officer who was riding his official motorcycle to work when he saw "the dual right rear tires" break off of a pickup truck and begin "rolling westbound in the No. 4 lane to the right of the truck." (*Id*. at p. 1152.) He responded to the emergency by "braking to create a traffic break to protect the motorists behind him and then by directing the defective vehicle to the side of the road," and was injured by the runaway tires in the process. (*Id.* at pp. 1151.) The *Kehli* court held that because "Kehli was injured by the very risk to which he responded in the line of duty to protect the public," the "independent cause" exception did not apply. (*Id.* at pp. 1158–1159.)

Plaintiffs argue that the present case is distinguishable from *Kelhi* in that "Favro's actions were separate and independent from the reason the firefighters had been summoned to the scene [i.e., the four-car pileup]." But the scene of Favro's wrecked car in the middle of the highway was the specific location requiring the firefighters' intervention, and it was, in fact, Favro's conduct that created the "very risk to which [the firefighters] responded" in discharging that specific duty. *Kelhi, supra,* 25 Cal.App.4th at p. 1159. Thus, for purposes of determining whether the "independent cause" exception applies, the facts here essentially parallel those in *Kelhi*.

[3] Moreover, as Favro's loss of control of his vehicle did not directly injure the firefighters, it is unclear how his negligent driving—the purportedly "independent cause" relied on by plaintiffs—increased the risk inherent in the firefighters' tending to the individuals on the shoulder of the highway.

Plaintiffs fare no better by citing several cases in which the independent cause exception applied, as they are distinguishable. In each of the cases on which plaintiffs rely, the conduct that injured the plaintiff was in fact separate from and independent of the reason for the plaintiff's presence at the location of injury. (See, e.g., *Malo v. Willis* (1981) 126 Cal.App.3d 543, 545 [police officer on shoulder of road for traffic stop, hit by third party during course of traffic stop]; *Terry v. Garcia* (2003) 109 Cal.App.4th 245, 248–249 [police officer responding to domestic disturbance call injured by third party's truck while responding to call]; *Shaw v. Plunkett* (1982) 135 Cal.App.3d 756, 757–758 [police officer in process of arresting prostitute hit by negligent driving of prostitute's customer, who was trying to leave parking lot]; *Spargur v. Park* (1982) 128 Cal.App.3d 469, 471 [motorcycle officer who pulled defendant over for speeding injured when defendant engaged in additional negligent conduct–specifically, failing to stop before hitting the motorcycle].) Here, by contrast, Favro's allegedly negligent driving was both the reason for the firefighters' presence in the middle of the highway and precisely the conduct for which the firefighters seek to hold him liable.

Plaintiffs also present a series of hypotheticals intended to "illustrate the inequity in the trial court's 'new scene' reasoning." For example, plaintiffs invite us to consider a scenario in which "the sequence of events began as they [*sic*] actually did, but Briseno-Castaneda is driving normally and is unable to avoid and collides with Favro's car in lane number 3, then careens off it and hits the firefighters on the shoulder of the road *before they set out to assist Favro*." According to plaintiffs, no conceivable public policy goal is served by holding the "independent cause" exception applicable in such a scenario, but not in a scenario where the firefighters "have taken steps toward Favro's car [before being] hit."

On the contrary, where an exception to the firefighter's rule does not apply, the relevant public policy considerations are those that underlie the firefighter's rule in the first place. Among these considerations is the policy "that it would be too burdensome to charge all who carelessly cause or fail to prevent fires with the injuries suffered by the expert retained with public funds to deal with those inevitable, although negligently

created, occurrences." (*Giorgi v. Pacific Gas & Electric Co.*, *supra*, 266 Cal.App.2d at p. 359.) Other considerations include "the spreading of the risk" and "the policy of efficient judicial administration." (*Ibid*.) In short, the policy considerations underlying the "independent cause" exception are distinct from the overarching policy considerations underlying the firefighter's rule; we see no reason to allow the former to swallow the latter where, as in *Seibert*, the Moraga-Orinda firefighters were injured while responding to a new scene created by Favro's negligent driving.

In sum, the "independent cause" exception to the firefighter's rule is inapplicable.

III. There Is a Triable Issue of Fact Material to the Exception Set Forth in Section 1714.9, subdivision (a)(1).

We agree, however, with plaintiffs' argument that section 1714.9, subdivision (a)(1) precludes summary judgment. Subdivision (a)(1) provides as follows: "(a) Notwithstanding statutory or decisional law to the contrary, any person is responsible not only for the results of that person's willful acts causing injury to a peace officer, firefighter, or any emergency medical personnel employed by a public entity, but also for any injury occasioned to that person by the want of ordinary care or skill in the management of the person's property or person, in any of the following situations: (1) Where the conduct causing the injury occurs after the person knows or should have known of the presence of the peace officer, firefighter, or emergency medical personnel." (Section 1714.9, subd. (a).)

Although the plain meaning of subdivision (a)(1) would seem to encompass any situation in which a defendant knew or should have known of the presence of emergency responders, case law interpreting the statute has held that it "applies only to conduct committed after the [firefighter] responds to a call for assistance, or while he is in the performance of his duties with respect to a specific incident, and such conduct increases the risk of injury to the [firefighter]. It does not require citizens to be especially vigilant or careful whenever they happen to observe the near presence of a member of the class covered by the statute." (*Seibert*, *supra*, 18 Cal.App.4th at p. 410.)

Here, James Kang allegedly saw Favro turn his head in the direction of the fire engine, looking directly at it as he lost control of his car. In addition, the firefighters parked the fire engine conspicuously in the No. 4 lane and activated its flashing-overhead and rear lights. On these facts, plaintiffs argue that Favro's allegedly negligent conduct occurred after he knew or should have known of the firefighters' presence, thus falling within the exception set forth in subdivision (a)(1). But as we have already explained, Favro's subsequent collision with the fire truck created a new scene, and, in turn, a new response by the firefighters, who walked onto the highway for the sole purpose of tending to Favro. Thus, whether Favro knew or should have known of the firefighters' presence before he lost control of his car is irrelevant to the question of whether subdivision (a)(1) applies; none of Favro's conduct prior to the collision is covered by the exception set forth in that statute. (*Seibert, supra,* 18 Cal.App.4th at p. 410.)

There is, however, the matter of Favro's alleged failure to cooperate promptly with the firefighters' request that he accompany them to the right shoulder. Rattery stated that Favro delayed for a period of "a couple minutes" before he allowed himself to be escorted to safety by the firefighters, by walking to the back of his car and then back to the driver's side before complying with the firefighters' directive to walk with them off the highway. Because that delay is alleged to have followed the firefighters' recommendation that Favro walk with them to safety, Favro's conduct in this respect could only have "occur[ed] after [he knew] or should have known of the presence of the . . . firefighter[s]" who came to his aid. (Section 1714.9, subd. (a)(1).)

In response, Favro contends that "there is no evidence that the emergency services workers were injured as a result of Favro's alleged delay." In the language of the statute, Favro seems to argue that even if his alleged uncooperative conduct occurred after he knew that the firefighters were present, that uncooperative conduct was not, as a matter of law, "the conduct causing the injury" to the firefighters. (Section 1714.9, subd. (a)(1).) We disagree.

Had Favro crossed the highway with the firefighters two minutes earlier, the firefighters would not have been in the path of Briseno-Castaneda's SUV when it lost

control. And even if Briseno-Castaneda was himself negligent in driving, "[t]he intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm which such conduct has been a substantial factor in bringing about." (*Sears v. Morrison* (1999) 76 Cal.App.4th 577, 580, quoting Rest.2d, Torts (1965) Legal Cause, § 443, p. 472.) Here, Favro allegedly caused the firefighters to linger in the middle of a stretch of wet highway where five different vehicles had just crashed in rapid succession. Under those circumstances, to be struck by a sixth car is neither abnormal nor unforeseeable. A reasonable factfinder might well conclude that by prolonging the firefighters' exposure to oncoming traffic, Favro's alleged delay increased the risk of the firefighters being struck by another vehicle. Accordingly, if a jury were to conclude that Favro was negligent in delaying, the exception in subdivision (a)(1) would apply to that delay.

There is thus a triable issue of material fact as to whether Favro was negligent in failing to cooperate with the firefighters before they were struck by Briseno-Castaneda's SUV. If that issue were to be resolved in plaintiffs' favor, section 1714.9, subdivision (a)(1), would apply, and the firefighter's rule would not. Because there is a triable issue of material fact, the trial court erred in granting summary judgment.

IV. There Is No Triable Issue of Fact Material to the Exception Set Forth in Section 1714.9, subdivision (a)(2).

Section 1714.9, subdivision (a)(2) imposes liability for "conduct causing injury" to emergency responders when that conduct "[1] violates a statute, ordinance, or regulation, and the conduct causing injury [2] was itself not the event that precipitated either the response or presence of the peace officer, firefighter, or emergency medical personnel." Plaintiffs contend that "[t]here is . . . a triable issue of fact as to whether the firefighters were injured because Favro was driving too fast for the weather conditions and the resulting condition of the road surface that morning, and at a speed that endangered the safety of persons and property, in violation of Vehicle Code section 22350."

However, as explained in our analysis of the "independent cause" exception, Favro's collision created a new scene requiring the firefighters to respond. Accordingly,

Favro's conduct leading up to the collision falls outside the requirement that "the conduct causing injury was itself not the event that precipitated the response . . . of the . . . firefighter." (Section 1714.9, subd. (a)(2).) Because the exception set forth in subdivision (a)(2) is inapplicable, the firefighter's rule applies to Favro's pre-collision conduct, rendering immaterial any issues of fact regarding Favro's speed and the weather conditions.

DISPOSITION

The judgment is reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

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BROWN, J.

WE CONCUR:

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POLLAK, P. J.

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STREETER, J.